SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1969.

No. 427.

DEFIANCE INDUSTRIES, INC.
and B.S.F. COMPANY,
and
ROBERT H. HUFFINES, JR., EDWARD KROCK
and VICTOR MUSCAT
Petitioners,

v.

DEBORAH TANZER and WILLIAM PRICKETT,
RECEIVER PENDENTE LITE,
Respondents.

BRIEF FOR RESPONDENTS, DEBORAH TANZER AND WILLIAM PRICKETT, RECEIVER PENDENTE LITE OF THE B.S.F. COMPANY.

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OPINION BELOW.

The unreported opinion of the United States Court of Appeals for the Third Circuit is set forth in Appendix A to the Petition, pages A1 to A4. The United States District Court for the District of Delaware did not render an opinion.

QUESTIONS PRESENTED.

1. Did the Court of Appeals correctly construe 28 U. S. C., Section 2004 as authorizing the exercise of discretion by the Federal Courts in a judicial sale of personalty to depart from the procedures statutorily called for in sales of realty if extraordinary circumstances exist?

2. Did the United States District Court for the District of Delaware properly invoke its discretion under 28 U. S. C., Section 2004, consonant with the facts and circumstances of this case, to confirm a sale of personalty without following the procedures statutorily called for in sales of realty?

STATUTES INVOLVED.

Relevant provisions of 28 U. S. C., Sections 2001 and 2004 are set forth in Appendix C to the Petition, pages A7-A8.

STATEMENT OF THE CASE.

On July 12, 1968 the United States District Court for the District of Delaware appointed William Prickett ("the Receiver") as Receiver *pendente lite* of B. S. F. Company ("B. S. F."), a Delaware corporation. 3A-10A.* The reasons for the appointment of the Receiver are set forth in the opinion of the District Court, *Tanzer v. Huffines*, D. C. Del., 1968, 287 F. Supp. 273, and in the opinion of the Third Circuit Court of Appeals affirming the appointment, 3 Cir., 1969, 408 F. 2d 42.

On December 24, 1968 the District Court authorized the Receiver to sell 146,228 shares of the common stock of American Steel and Pump Corporation ("A. S. P.") to David Morgan and Carl Glickman ("Morgan-Glickman") for $3,550,000. PA9-10. In the instant proceeding the petitioners claim that the procedure adopted for the conduct of this sale warrants review by this Court.

While the petitioners have limited their challenge to procedural matters, some description of the events which preceded the sale is called for because the background facts explain and fully justify not only the sale itself, but also, and most pertinently for present purposes, the procedure adopted for the sale. Understandably, the petitioners pay less than slighting attention to the background facts; indeed, their reference thereto is confined to one brief paragraph of the petition (Petition, page 3, paragraph 3).

When the Receiver was appointed, he found B. S. F. bereft of cash (100A-101A), with no prospects of receiving income from its investments. 100A-101A. He also found

* The reference to "A" is to the pages of the Appendix to the briefs filed with the Court of Appeals and included in the record certified by the Clerk of that Court and filed with the petition herein. Reference to "PA" is to the pages of the Appendix to the petition herein and the petition is referred to as "P".

that B. S. F. desperately needed funds to meet its obligations. $800,000 worth of its debentures fall due on December 1, 1969. 102A-103A. $205,000 was owed to two banks. 15A, 106A-107A, 111A-112A. Approximately $122,000 was owed on trade indebtedness, a loan from another bank and to Glen Alden Corporation. 111A-112A, 114A-115A. All the bank loans and these latter liabilities were in default (106A-107A, 111A, 114A-115A); and the indebtedness was constantly increasing because of unpaid interest, commitment fees and other charges. 102A.

B. S. F.'s plight was compounded by the fact that virtually all its assets, with the exception of 17,488 A. S. P. shares, were pledged to secure its liabilities. 101,240 A. S. P. shares were pledged against the debentures. 14A, 99A. 20,000 A. S. P. shares were pledged to the Guaranty Bank of Chicago. 14A, 107A. 7,500 A. S. P. shares were pledged to the Ohio National Bank. 14A, 111A. With the debentures due on December 1, 1969 and the bank loans already in default, something had to be done to avoid a distress sale of the A. S. P. shares which would have caused monumental damage to B. S. F. The A. S. P. shares, pledged against the debentures and bank loans, were not registered under Section 5 of the Securities Act of 1933, 15 U. S. C., Sections 77A, *et seq.* (62A, 93A, 103A, 197A, 108A, 111A) and, accordingly, were not freely tradable; moreover, trading in A. S. P. stock was thin, and a distress sale of any of the A. S. P. shares would necessarily reflect a discount for blockage in a thin market. 173A-174A, 352A-355A. Most importantly, a piecemeal sale of the A. S. P. shares would not reflect the control value inherent in the entire block of stock owned by B. S. F. 105A, 243A. In these circumstances, it is little wonder that the Court of Appeals observed that ". . . it was incumbent upon the Receiver to attempt to find a solution to the corporation's dire financial problems." PA2.

Prior to and after the Receiver's appointment several concerns had made informal inquiries concerning the availability of the A. S. P. shares. 247A-248A. As the Court of Appeals noted: "The possibility that the stock might be available for purchase was well known in the financial community." PA2; *e.g.*, 133A, 205A. Nothing concrete came of these inquiries until November 1968 when, for the first time, firm offers were made for the stock.

The first offer, made on November 6, 1968, emanated from Victor Muscat ("Muscat"), the man largely responsible for B. S. F.'s predicament (*Tanzer v. Huffines, supra,* 408 F. 2d 42). Through control of B. S. F., Muscat controlled A. S. P. and was its chief executive officer. 239A-240A. In fact, in 1968 Muscat drew $61,000 in compensation from A. S. P. 239A-240A. It should be noted that Muscat also controlled Defiance Industries, Inc. ("Defiance") and thus controlled both of the parties (B. S. F. and Defiance) who prosecuted the appeal below and who have filed the instant petition to this Court. See PA2; see also *S. E. C. v. Fifth Avenue Coach Lines, Inc.*, S. D. N. Y., 1968, 289 F. Supp. 3, 11.

Not only did Muscat owe a fiduciary duty to B. S. F. and its stockholders, which he rarely, if ever, honored (*e.g., Norte & Company v. Huffines,* S. D. N. Y., 1968, 288 F. Supp. 855), but also he was intimately knowledgeable about A. S. P. 123A-124A; see PA4. Yet, his November 6, 1968 offer was for only $16.00 per share, more than $8.00 per share below the Morgan-Glickman bid which Muscat, through his controlled companies, B. S. F. and Defiance, hypocritically railed against on the appeal below and, of course, in the petition filed in this Court. The Receiver rejected Muscat's $16.00 per share offer and not even the petitioners have had the temerity to criticize that eminently sound judgment.

In the ensuing four weeks after Muscat's $16.00 per share offer, three substantial members of the business community presented offers ranging between $18.00 and $22.00 per share for the A. S. P. stock; subject to varying conditions. 18A, 19A, 20A, 124A-127A. The offer at $22.00 per share was particularly disadvantageous because it was coupled with a number of completely unacceptable conditions, including (1) the payment of an alleged debt from Wright Machine Corporation ("Wright") to A. S. P., which debt was virtually uncollectible (244A, 362A-363A); (2) a minimal cash deposit with the balance payable in installments (see 126A); and (3) an audit of A. S. P. 36A-37A, 126A.

Having reviewed and considered the views of the business community concerning prices and terms for the purchase of the A. S. P. stock, the Receiver concluded that the offer of the Seagrave Corporation ("Seagrave") was the most favorable because its offering price of $20.25 per share was the highest unconditional cash offer made for the stock. The Seagrave offer was an immediate 100% cash offer, not requiring an audit of A. S. P. nor any representations or warranties or the like to be made by the Receiver or B. S. F. concerning the condition or worth of A. S. P. 124A-125A, 126A-129A.

Seagrave, however, did insist upon a cutoff date of December 21, 1968 for approval of the contract by the District Court. 52A, 57A, 60A, 204A-206A. Through hard bargaining the Receiver was able to persuade Seagrave to extend the cutoff date to December 24, 1968. 52A, 204A-206A.

The contract with Seagrave was signed on December 5, 1968. The Seagrave contract was *expressly conditioned* on approval by the District Court. 24A-34A, 124A-129A. Working assiduously, even with an intervening weekend, the Receiver by December 10, 1968 assembled and prepared

the necessary papers for submission of the offer to the District Court. The Court thereupon ordered the hearing set down for December 20, 1968 with immediate notice of the offer and the hearing going to all interested persons, including the parties to the litigation, all B. S. F. stockholders and the Securities and Exchange Commission. 11A-37A, 38A-42A. The offer was also announced in the financial press. 371A, 80A, 321A.

On December 13, 1968 the petitioners moved the District Court to continue the December 20 hearing. 42A-43A. After full oral argument the Court denied the continuance because, obviously, to grant it would have meant the end of the Seagrave offer and would have mooted the purpose of having a hearing. 44A-71A. Had the petitioners had their way, the District Court would not have even availed itself of an opportunity to pass upon the Seagrave offer.

At the hearing before the District Court a substantial amount of evidence was adduced concerning the value of the A. S. P. stock. Earnings for 1967 and 1968 were approximately $2.00 per share. 175A, 232A. The Receiver used a multiplier of 10 to capitalize these earnings and the petitioners offered no contrary evidence. 177A-178A, 180A-181A. Indeed, A. S. P.'s earnings for the ten years prior to the hearing averaged just under $2.00 per share ($1.92 per share) and in only two years out of the ten (1965 and 1966) were earnings much in excess of $2.00 per share. 376A. The market price for A. S. P. stock was a relatively insignificant factor because trading was very thin and open market trading did not reflect the control value of the entire block of A. S. P. stock owned by B. S. F. 173A-174A. The market price prior to the hearing was approximately $16.00 per share. 173A.

A. S. P. had not paid dividends in the past and had no prospects of paying dividends in the foreseeable future.

98A-99A. In fact, B. S. F. had never received a penny from its $3,000,000 investment in A. S. P. stock. 98A-99A. Book value, based upon the most recent audited statements of A. S. P., with adjustments for indisputably soft items on the balance sheet, was approximately $20.00 per share. 166A-167A, 243A-244A, 362A-363A, 373A, 370A.

Of serious concern to the Receiver and the District Court was the evidence offered of existing and potential depreciation in the value of the A. S. P. stock. As noted, earnings in 1967 and 1968 were considerably lower than the historical highs in 1965 and 1966. A $1,200,000 bank loan had recently been called (249A) and A. S. P.'s inventory and accounts receivable were factored at high interest rates. 249A-250A. Cash was almost non-existent (250A) and both production and sales had slowed down because of the cash shortage. 250A-251A. Moreover, the Receiver had ample reason to believe that Muscat's continuing intervention in A. S. P.'s affairs could only lessen the company's prospects for rehabilitation. 116A-117A, 177A, 252A-253A.

In the light of the substantial body of information concerning A. S. P.'s worth and prospects developed at the hearing, both the District Court and the Court of Appeals concluded that the importance of an independent appraisal, which undoubtedly would have been time consuming and costly (and, of course, B. S. F. had little time and no cash) was "outweighed by the other evidence tending to show that the best price under the circumstances was obtained for the stock." PA4. It is also noteworthy that the three bids on December 23, 1968 (see *infra*), each independent of the others, differed by only $15,000 although an aggregate amount of over $3,500,000 was involved. 331A-332A. Moreover, the petitioners, both in the District Court and in the Court of Appeals, failed to articulate "a formula which shows that the price received does not represent the

fair value of the stock. This is particularly significant here since Victor Muscat was the dominant force in the corporation whose shares were being sold and thus was in a position to testify as to value." PA4.

At the outset of the hearing on December 20, 1968, the District Court expressed its willingness to entertain other bids (72A-75A, 79A, 136A-137A, 162A, 195A) and, indeed, other bids were forthcoming during the course of the hearing. 78A-79A, 331A-332A. The hearing was continued to December 23, 1968, for the purpose of receiving additional bids. At this hearing another bid was received from Seagrave for $3,540,000 (331A); from Victor Metal Products Corporation ("Victor Metal") for $3,555,000 (331A-332A), conditioned, however, upon the approval of the Securities and Exchange Commission (see *infra*), and from Morgan-Glickman for $3,550,000 (approximately $24.27 per share) (331A) without conditions, which latter bid was eventually approved by the District Court as the highest unconditional bid that was made for the A. S. P. stock. 332A-333A, 336A. During the bidding Seagrave and Morgan-Glickman refused to extend the cutoff date beyond December 24, 1968. 204A-209A, 212A-213A, 216A-221A, 311A, 317A, 318A.

As stated above, the Victor Metal bid was conditioned upon the approval of the Securities and Exchange Commission. 213A-214A, 291A. Victor Metal is owned by a Trust of which Muscat is the beneficiary (213A) and his involvement with Victor Metal was the basic reason why its bid was so conditioned. 213A-214A, 291A. Whether the Commission would ever approve the arrangement and how long it might have taken to receive such approval were matters of conjecture. 306A-307A.

In any event, it is clear that the Victor Metal bid was, to all intents and purposes, Muscat's bid and it is noteworthy that this bid was only $5,000 higher than the un-

conditional Morgan-Glickman bid (only $15,000 separated all the December 23, 1968 bids). The pained outcries of Muscat's controlled companies about purported unfairness in the proceedings below come with poor grace in the light of Muscat's actions before and at the District Court hearing. With Muscat an unsuccesful bidder for the A. S. P. stock and facing the loss of his substantial personal emoluments from A. S. P., it can well be said that the appeal below and the petition to this Court reflect, more than anything else, his disappointment in the outcome of the sale. Certainly, the appeal below and the petition to this Court do not reflect in the slightest the plight of B. S. F., the peril hanging over the investment of B. S. F.'s public stockholders, the time limitations confronting the Receiver, the scrupulous attention to due process which characterized the proceedings below, and the absolute fairness of the Morgan-Glickman bid measured by any valuation formula.

ARGUMENT.

The petitioners' entire argument in this Court is premised upon procedural matters, embellished with flowery statements to the effect that allegedly novel questions of procedure deserve review by this Court, that due process rights were violated below and that the judicial process was abused. The fact is that when the petitioners' argument is shorn of these strained generalities, it is self-evident that their complaint here is grounded upon one circumstance only—the petitioners' chagrin that the District Court did exactly what Congress authorized the Federal Courts to do under 28 U. S. C., Section 2004.

28 U. S. C., Section 2004 expressly, unequivocally and unambiguously authorizes the Federal Courts to order the holding of a judicial sale of personalty (as was the case here) apart from the procedures set forth in 28 U. S. C., Section 2001 which governs realty sales. Congress has maintained this distinction between sales of personalty and sales of real estate since at least 1893 when the predecessors to Sections 2001 and 2004 were enacted. *Yazoo v. M. V. R. Co. v. City of Clarksdale,* 257 U. S. 10, 42 S. Ct. 27, 66 L. Ed. 104 (1921). Indeed, although Congress in 1934 significantly amended the provisions dealing with sales of realty to permit private as well as public sales thereof, no substantive change was made in the provisions governing sales of personalty. See *Chase Nat. Bank of City of New York v. Pan American Pet. Co.,* D. C. S. D. Cal., 1934, 9 F. Supp. 394.

Pursuant to the mandate found in Section 2004, the sale of the A. S. P. shares was not conducted as if the shares were real property. This was done not out of whimsy, caprice or indifference to substantive rights; it was done because exigencies of economics and time militated against any unnecessary delay and, even more criti-

cally, against jeopardizing the welfare of B. S. F. and its stockholders by subjecting them to risk and speculation, the necessary consequences of the petitioners' contentions. See District Court's comments at 325A.

The record herein demonstrates that compelling facts prompted the District Court to exercise the discretion expressly granted by Congress to conduct the sale of the A. S. P. shares apart from the procedures which obtain in sales of realty. Those facts are summarized in the Respondents' Statement of the Case, *supra,* and in the opinion of the Court of Appeals (PA1-4) and need not be repeated here. Suffice it to say that the Court of Appeals applied the provisions of Section 2004 to those facts (something which petitioners are understandably reluctant to do) and found that "the district court was justified in expediting the hearing in this case primarily because of the financial condition of the corporation and the deadline fixed by the offeror." PA4.

In applying Section 2004, the Court of Appeals did not, as the petitioners contend, construe the statute to grant "unlimited discretion" to the District Courts to depart from Section 2001 procedures. P8. Quite to the contrary, the Court of Appeals ruled that Section 2001 "does express a preferential course to be followed in connection with a court authorized sale of property and that the district court should not order otherwise except under extraordinary circumstances." PA4. Thus, the Court of Appeals enunciated a standard for conducting sales of personalty which is not only consistent with the entire statutory structure but also achieves a required measure of flexibility (explicit in the legislation in question) when, as in the case at Bar, extraordinary circumstances arise calling for expeditious handling of a sale of personalty, which is exactly what confronted the District Court in this case.

The Court of Appeals also ruled that if extraordinary circumstances exist and a sale of personalty is conducted apart from the procedures set forth in Section 2001, appellate review of the District Court's decision is still measured by the traditional abuse of discretion test. It is the latter ruling which the petitioners most oppose, although their argument is devoid of any sound reasons why the abuse of discretion test should be cast aside in the case of judicial sales.

While the petitioners contend that the limits of the Federal Courts' discretion under Section 2004 is a first impression "question" (P7), it is obvious that their so-called "question" is not a question at all, but rather a call for judicial legislation which, contrary to the clear language of the statute, would confine sales of personalty to minor deviations from the procedure set forth in Section 2001, unless a "market value" for the personalty in question exists, which the petitioners sometimes describe as a "reliable" market value and at other times as an "ascertainable" market value, without ever defining what those terms might mean. And the petitioners' proposed drastic, rigid and, of course, non-statutory limitations upon a sale of personalty must be followed—according to the petitioners—irrespective of compelling circumstances such as need, time limitations, risks, business fluctuations and the like. Obviously, to state the petitioners' position is sufficient to refute it.

The petitioners made an identical demand for judicial legislation before the Court of Appeals, but that Court, quite rightly, refused to pervert its own jurisdiction and the clear Congressional mandate found in Section 2004. In so doing, the Court of Appeals not only properly interpreted the statute, but also followed numerous rulings of this Court and Court of Appeals' decisions standing for the proposition that the District Courts may, indeed, exer-

cise discretion in conducting judicial sales and, particularly, sales of personalty. In *Yazoo, supra,* this Court said in discussing the place where a sale is conducted: "The second section, however, while it directs that personalty shall be sold as provided in the realty section, vests *full discretion* in the Court to sell it elsewhere." (Emphasis added.) In *Stokes v. Williams,* 3 Cir. 1915, 226 F. 148, cert. den. 241 U. S. 681, 36 S. Ct. 728, 60 L. Ed. 1234, the abuse of discretion test was applied in reviewing a District Court sale although (1) it was a private sale; (2) there was no reference to a special master; (3) there was no public notice of the sale, by advertisement or otherwise; and (4) notice was only given to the parties and creditors and stockholders of the corporation in receivership. *Stokes v. Williams, supra,* has been cited with approval on many occasions; to cite as examples only a few of the Court of Appeals decisions apposite to *Stokes,* see *Interstate Oil Co. v. Gormley,* 9 Cir., 1939, 105 F. 2d 431, 434, cert. den. 308 U. S. 626, 60 S. Ct. 383, 84 L. Ed. 522, reh. den. 309 U. S. 694, 60 S. Ct. 512, 84 L. Ed. 1035; *Backus v. Jaffray,* 8 Cir., 1934, 73 F. 2d 823; *Smith v. Hill,* 3 Cir., 1925, 5 F. 2d 188; and *Cockstetter v. Williams,* 9 Cir., 1925, 9 F. 2d 354. See also *Pewabic Mining Co. v. Mason,* 145 U. S. 349, 12 S. Ct. 887, 36 L. Ed. 732, 734.

In short, the Petition herein does not present a novel question of federal procedure or statutory construction. Indeed, it may well be said that the proceedings below exemplify the exercise of sound judicial discretion which Congress has seen fit to leave to the Federal Courts in the field of judicial sales of personalty, if only because mechanics must often be shaped by facts and equities which rigid and inflexible procedures may destroy. Compare sales under the National Bank Act, 12 U. S. C. Section 192.

Moreover, it is hardly likely that "the integrity of federal judicial sales will be jeopardized by allowing the decision below to stand", as the petitioners advocate. P8. The Court of Appeals has ruled that only "extraordinary circumstances" will warrant departure from Section 2001 procedures. It will be a rare litigant, indeed, unless faced with B. S. F.'s dire financial problems and time limitations, who will be able to meet that severe burden.

Having said the above, it is evident that the petitioners' argument that the procedure below was violative of due process and constituted an improper departure from the accepted course of judicial proceedings borders on the frivolous. The Receiver received a fair, reasonable, totally arm's length offer for the A. S. P. stock; he presented the offer to the District Court; notice was given to all interested persons, including the parties, all B. S. F. stockholders and the Securities and Exchange Commission; a full hearing was held to consider the offer; the District Court expressed its willingness to entertain additional bids and did so; and the District Court ultimately approved the highest unconditional bid for the stock. It is clear that the requirements of due process were meticulously observed in the proceedings below and that a rational, thoughtful and judicious decision was handed down, consonant with the needs of B. S. F. and its stockholders, after careful consideration of the evidence and the views of all interested persons. Compare *McRaney v. Riley,* 91 So. 399, 128 Miss. 665, 22 A. L. R. 685, cert. den. 260 U. S. 727, 43 S. Ct. 90, 67 L. Ed. 484 (under the Bankruptcy Act).

One final reason should be noted why the decision below does not warrant review on certiorari. The Receiver said below that B. S. F.'s very survival may well depend upon the outcome of the appeal to the Court of Appeals. B. S. F. desperately needed then and needs now the pro-

ceeds of the instant sale to forestall the ruinous consequences of foreclosure proceedings. Setting aside the sale would be even more ominous to B. S. F. today because only a few months remain before the debentures fall due. There is absolutely no assurance that B. S. F. and its many public stockholders, who are innocent of the blatant self-interest which Muscat brings to these proceedings, will be able to withstand the ravages of distress sales or the hazards of unavailing efforts to raise cash in the fleeting time which will be left to the Receiver if Muscat, through the petitioners, has his way.

CONCLUSION.

For the foregoing reasons the Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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